No. 94-2135

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In the Supreme Court of the United States

OCTOBER TERM, 1995

CITY OF MORGAN CITY, PETITIONER

v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that petitioner's attempted expropriation of property belonging to a federally financed rural electric cooperative was preempted by the Rural Electrification Act, 7 U.S.C. 901 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 31 F.3d 319. The supplemental opinion of the court of appeals denying rehearing (Pet. App. 24a-27a) and the opinion dissenting from the denial of rehearing en banc (Pet. App. 28a-34a) are reported at 49 F.3d 1074. The opinion of the district court (Pet. App. 12a-23a) is reported at 837 F. Supp. 194.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1994. A petition for rehearing was denied on April 3, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a municipality in Louisiana. In 1985, it annexed an adjacent area containing electric facilities belonging to and customers served by respondent South Louisiana Electric Cooperative Association (SLECA). SLECA is a rural power cooperative financed by the federal government under the Rural Electrification Act, 7 U.S.C. 901 *et seq.* After the annexation, petitioner, which operates its own municipal utility, offered to purchase all of SLECA's property in the annexed area, including facilities and the exclusive right to provide power. When SLECA refused the offer, petitioner brought this expropriation action in state court, seeking to condemn the property rights at issue. Respondent Cajun Electric Power Cooperative, Inc. (Cajun)—SLECA's wholesale power supplier and also a federally financed rural electric cooperative—intervened. The United States, which holds a security interest in SLECA's and Cajun's assets, was joined as a third-party defendant and removed the matter to federal court. Pet. App. 2a-3a.

2. The Administrator of the Rural Electrification Administration (REA)[1] subsequently filed into the

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[1] Subsequent to the events in this case, the REA was redesignated as the Rural Utilities Service. See Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, Tit. II, § 232, 108 Stat.

record a signed declaration objecting to petitioner's state-law expropriation on the ground that it would cause substantial harm to the federal rural electrification program. The Administrator explained that the threatened expropriation would frustrate the federal program for three reasons. First, the annexed area is the most heavily populated part of SLECA's service territory and thus is the area SLECA is able to serve most economically and efficiently. Accordingly, loss of that area's customer load would increase the cost of power for SLECA's remaining customers. Second, this expropriation is not an isolated occurrence; it is part of a larger pattern of expropriations of SLECA service territory, the effects of which must be considered cumulatively. Third, the impact of the expropriation is not limited to SLECA; expropriations targeting SLECA affect SLECA's power supplier, Cajun, as well as the entire, interconnected chain of REA-financed cooperatives of which SLECA is but one part. Pet. App. 3a-4a.

Based on those concerns, the United States, joined by SLECA and Cajun, filed a motion to dismiss or in the alternative for summary judgment, arguing that the proposed expropriation was preempted by the Rural Electrification Act. The district court granted summary judgment. In the district court's view, the Administrator of the REA was authorized by 7 U.S.C. 907 to withhold approval of the expropriation, and the Administrator's assessment that the expropriation would be contrary to the federal rural electrification

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3219 (codified at 7 U.S.C. 6942). Consistent with the decisions below, this brief will refer to the agency as the REA.

program was not arbitrary and capricious. Pet. App. 12a-23a.

3. A unanimous panel of the court of appeals affirmed. The court "save[d] for another day the issue of whether 7 U.S.C. § 907 by its terms confers authority on the Administrator to withhold approval of an involuntary disposition, and instead consider[ed] only whether a conflict [between state and federal law] exists because the proposed state-law expropriation would frustrate a federal purpose." Pet. App. 5a. See also *id.* at 8a ("Our primary function is to determine whether, under the circumstances of th[e] particular case, [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.") (quoting *Hines* v. *Davidwitz*, 312 U.S. 52, 67 (1941)). Examining the record compiled in the instant case, the court of appeals held that petitioner's attempted state-law expropriation was preempted because it would frustrate the purposes of the rural electrification program. The court explained:

> Even if fair value is paid for the lost facilities, [the expropriation] would inevitably have an adverse effect on the remaining customers * * * in the form of lost economies of scale and resulting higher per-user costs. To allow expanding municipalities to "skim the cream" by annexing and condemning those parts of a [rural power cooperative] with the highest population density (and thus the lowest per-user cost) would undermine Congress's purpose of facilitating inexpensive [power] supplies for farmers and other rural residents and protecting [cooperatives'] ability to repay their [REA] debts.

Pet. App. 9a (quoting *City of Madison* v. *Bear Creek Water Ass'n*, 816 F.2d 1057, 1060 (5th Cir. 1987)).

The court of appeals also placed substantial reliance on two decisions of the Ninth Circuit. Pet. App. 8a-10a (citing *Public Util. Dist. No. 1 of Franklin County* v. *Big Bend Elec. Coop., Inc.*, 618 F.2d 601 (1980); *Public Util. Dist. No. 1 of Pend Oreille County* v. *United States*, 417 F.2d 200 (1969)). In each of those cases, the Ninth Circuit had held a municipal condemnation of rural electric cooperative property preempted on the ground that it would frustrate the purposes of the rural electrification program. See *Big Bend*, 618 F.2d at 603 (holding that "under the Supremacy Clause of the Constitution a state municipal public utility could not condemn property owned by a federally subsidized public utility where the condemnation would interfere with the federal purpose of the Rural Electrification Act"); see also *Pend Oreille*, 417 F.2d at 201 ("This is not an ordinary case because what is sought to be taken here is part of a system and even if the part taken is paid for * * * a question remains as to the capacity of the remaining portions of the system to function."). The court of appeals stated in the instant case that it "f[ou]nd the Ninth Circuit's [decisions] helpful and persuasive." Pet. App. 8a.

4. Petitioner sought rehearing and rehearing en banc in the court of appeals. The panel issued a supplemental opinion explaining its denial of the petition for rehearing. Pet. App. 24a-27a. In particular, the panel rejected petitioner's reliance on *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983). *Arkansas Electric*, the panel explained, involved "a facial challenge to a

state's right to regulate a rural cooperative's wholesale electric rates." Pet. App. 25a. Here, by contrast,

> SLECA does not assert a facial challenge to a state's power to regulate or expropriate a rural cooperative's service area and equipment. Rather, SLECA challenges actual expropriations of its specific property and service rights. [Petitioner's] characterization of our decision as creating a "per se" rule of preemption is therefore mistaken. The panel's preemption analysis focussed on the actual effect of these specific expropriations, not whether the REAct facially preempts all attempts by states to expropriate the property of a rural cooperative.

Ibid. Three judges dissented from the denial of rehearing en banc (*id.* at 28a-34a), expressing the view that *Arkansas Electric* "is fatal to the panel's decision." Pet. App. 29a.

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The court of appeals correctly concluded that petitioner's proposed state-law expropriation would undermine the Rural Electrification Act's core purpose of providing reliable, low-cost electricity to rural America. See Pet. App. 6a, 8a, 11a. SLECA's power system was constructed and developed with long-term, low-interest federal loans, the sole purpose of which was to foster rural electrification. Yet petitioner seeks to divert SLECA's facilities for its own, local purposes that are not concerned with rural

electrification. Moreover, the expropriation targets a particularly dense portion of the SLECA system, whose removal from the rest of the system would increase the cost of power for SLECA's remaining customers, who are the intended beneficiaries of the statute. See *id.* at 3a. In addition, SLECA does not exist in isolation; it is part of a substantial, interconnected network of rural cooperatives that provide power throughout rural Louisiana. Even if each individual expropriation is small in scope, a pattern of expropriations like the one in this case could have a significant cumulative effect on the well-being of the system as a whole. See *id.* at 3a-4a. The proposed expropriation would therefore "stand as an obstacle to the repayment of federal loans, to the financial viability of federally financed electricity cooperatives, and ultimately, to the maintenance of electricity service to rural areas." *Id.* at 10a (internal quotation marks omitted).

As the court of appeals noted, petitioner's selective expropriation of a designated portion of SLECA's electric system would "skim the cream" (Pet. App. 9a) from that system, thereby inflicting increased costs on rural consumers of electricity. Moreover, in combination with other, similar expropriations, petitioner's action threatens to effect a "piecemeal erosion" (*id.* at 10a; see *id.* at 27a) of the integrated rural power network to which SLECA belongs—a network that has been built and developed over a period of many years with massive federal funding. *Id.* at 2a n.2, 6a.[2] Under those circumstances, the

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[2] Cajun, which provides power in bulk to SLECA and twelve other REA-financed rural distribution cooperatives

court of appeals correctly held that the expropriation would be antithetical to the interests of the rural electrification program.

2. a. Petitioner places substantial reliance (see Pet. 21) on *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983). Three judges on the court of appeals, dissenting from the court's denial of rehearing en banc, also regarded *Arkansas Electric* as "fatal to the panel's decision." Pet. App. 29a. In fact, *Arkansas Electric* is fully consistent with the court of appeals' resolution of the instant case.

The Court in *Arkansas Electric* rejected the contention that the Rural Electrification Act pre-empts *all* state regulation of rates charged by co-operatives financed by the REA. The Court explained that

> a particular rate set by the Arkansas [Public Service Commission] may so seriously compromise important federal interests, including the ability of [a cooperative] to repay its loans, as to be implicitly pre-empted by the Rural Electrification Act. We will not, however, in this facial challenge to the [Public Service Commission's] mere assertion of jurisdiction, assume that such a hypothetical event is so likely to occur as to preclude the setting of any rates at all.

461 U.S. at 389 (citations omitted). In the instant case, by contrast, "[t]he panel's preemption analysis focussed on the actual effect of these specific expropriations, not whether the REAct facially preempts

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throughout Louisiana, has obtained approximately $3 billion in REA loans and loan guaranties. See Pet. App. 2a n.2.

all attempts by states to expropriate the property of a rural cooperative." Pet. App. 25a. *Arkansas Electric* did not hold or suggest that the Rural Electrification Act could never preempt state utility regulation; to the contrary, it expressly recognized the possibility that the deleterious effects of state regulation on the functioning of federally financed cooperatives could constitute an appropriate basis for finding such regulation to be preempted.[3]

b. Petitioner concedes that there is no conflict among the circuits on the question presented here. Indeed, other than the Fifth Circuit's decision in this case, only the Ninth Circuit has addressed questions concerning preemption of municipal condemnation of rural electric cooperative property. As the court of appeals noted in the instant case (Pet. App. 8a-10a), the Ninth Circuit has twice held such a condemnation preempted, based on a determination in each case that the condemnation at issue would frustrate the purposes of the federal rural electrification program. *Pub. Util. Dist. No. 1 of Franklin County* v. *Big Bend Elec. Coop., Inc.*, 618 F.2d 601 (9th Cir. 1980);

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[3] As *Arkansas Electric* demonstrates as well, the fact that this case involves utilities, a subject assertedly of heightened state and local concern, also does not foreclose preemption. Cf. Pet. 18. It is well established that otherwise applicable preemption principles are not rendered "inapplicable * * * simply because [the matter] is [said to be] of special concern to the States: 'The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'" *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Free* v. *Bland*, 369 U.S. 663, 666 (1962)). See also *Gade* v. *National Solid Wastes Management Ass'n*, 505 U.S. 88, 108 (1992).

Publ. Util. Dist. No. 1 of Pend Oreille County v. *United States*, 417 F.2d 200 (9th Cir. 1969). The court of appeals in the instant case expressly relied upon the rationale of those Ninth Circuit precedents. See Pet. App. 8a ("We find the Ninth Circuit's [decisions] helpful and persuasive in answering the question before us.").

c. Finally, the state-court cases upon which petitioner relies are not in conflict with the decision below. See Pet. 14-15 (citing *Decatur County Rural Elec. Membership Corp.* v. *Pub. Serv. Co.*, 301 N.E.2d 191 (Ind. 1973); *City of Rochester* v. *Peoples Coop. Power Ass'n*, 505 N.W.2d 621 (Minn. Ct. App. 1993)). In *Decatur*, the United States did not participate in the litigation and did not object to the condemnation on preemption or any other grounds. In the instant case, by contrast, the court of appeals placed substantial reliance on the REA's conclusions regarding the potential deleterious effects of the proposed expropriation, in conjunction with other planned condemnations, on respondent SLECA's operations and on the implementation of the federal scheme. See Pet. App. 26a-27a. In *City of Rochester* as well, the parties had not proffered a showing that the condemnation at issue, if consummated, would frustrate the purposes of the rural electrification program. The court in *City of Rochester* expressly acknowledged that a condemnation that would seriously compromise federal interests under the Rural Electrification Act would be subject to preemption. *City of Rochester*, 505 N.W.2d at 626.

3. Petitioner chides the court of appeals for giving "a literal reading" (Pet. 16) to this Court's holding that state law is preempted where it "stands as an

obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). It is well established, however, that state law that interferes with the operation of a federal statute is preempted, and that this result "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Gade* v. *National Solid Wastes Management Ass'n*, 505 U.S. 88, 98, 105-107 (1992). Indeed, this Court has continued to employ the *Hines* formulation, with no indication that other than a "literal" application of that standard is appropriate. See, *e.g.*, *Freightliner Corp.* v. *Myrick*, 115 S. Ct. 1483, 1487 (1995); *Volt Info. Sciences, Inc.* v. *Board of Trustees*, 489 U.S. 468, 477 (1989); *Michigan Canners & Freezers Ass'n* v. *Agricultural Marketing & Bargaining Board*, 467 U.S. 461, 469 (1984); *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 203-204 (1983); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 526 (1977).

As petitioner observes (see Pet. 22), this Court's more recent decisions treat the *Hines* formulation as a species of "conflict" preemption rather than as a separate preemption category. See, *e.g.*, *Freightliner*, 115 S. Ct. at 1487 ("We have found implied conflict pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'") (quoting *Hines*, 312 U.S. at 67; additional citation and internal quotation marks omitted). The crucial point, however—and one repeatedly reaffirmed by this Court—is that state law

may conflict with (and therefore be preempted by) a federal statute even where that statute contains no express preemption provision, and even where the State has not rendered compliance with federal law impossible.[4] Contrary to petitioner's suggestion (see Pet. 22-23), the court of appeals did not treat "frustration" as a category of preemption doctrine separate and distinct from "conflict" preemption. Rather, it framed the inquiry as "whether a conflict [between state and federal law] exists because the proposed state-law expropriation would frustrate a federal purpose." Pet. App. 5a. That mode of analysis is fully consistent with this Court's precedents.

4. Finally, there are no extraordinary circumstances warranting this Court's review in the absence of a conflict in authority. The infrequency of appellate litigation concerning this issue suggests that the question presented is not one of pressing importance. There is, in particular, no basis for petitioner's contention that the decision below "effectively creates a constitutional barrier to municipal expropriation of cooperative property." Pet. 13. To

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[4] See also *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 507 (1988) (in areas of "uniquely federal interest," "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption"). The Court in *Boyle* held that application of state tort law to a product liability suit between private parties was preempted because the predictable effect of such suits was to raise the cost to the government of military equipment procured from private contractors. *Id.* at 511-512. The government's interest in obtaining repayment of REA loans likewise qualifies as a "uniquely federal interest," and a persuasive showing that state expropriations threaten that interest furnishes an entirely appropriate basis for preemption.

the contrary, the court of appeals made clear that its "preemption analysis focussed on the actual effect of these specific expropriations, not whether the REAct facially preempts all attempts by states to expropriate the property of a rural cooperative." Pet. App. 25a. To the extent that petitioner characterizes the court of appeals' decision as establishing a per se rule of preemption, petitioner is therefore in error. Insofar as petitioner takes issue with the court of appeals' application of the governing standard to the record in this case, that fact-bound claim does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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